

89-1938

Supreme Court, U.S.
FILED

MAY 17 1990

JOSEPH F. SPANIOL, JR.
CLERK

Case No. _____

UNITED STATES SUPREME COURT

1990 Term

JOSEPH C. KIRCHDORFER and
SKIP KIRCHDORFER, INC.,

Petitioners

v.

SECRETARY,
U.S. DEPARTMENT OF LABOR,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER MERE DISAGREEMENT WITH THE DEPARTMENT OF LABOR OVER MATTERS NOT DEFINED BY REGULATIONS OR WHERE THE GOVERNMENT FAILS TO FOLLOW ITS OWN REGULATIONS AUTOMATICALLY CONSTITUTES INTENTIONAL VIOLATION OF THE SERVICE CONTRACT ACT RESULTING IN DEBARMENT FOR THREE YEARS FROM PERFORMING CONTRACTS WITH THE UNITED STATES GOVERNMENT.
2. WHETHER OR NOT PETITIONERS' GOOD FAITH EFFORT TO COMPLY WITH REGULATIONS MAY BE HELD TO BE INTENTIONAL VIOLATIONS OF THE SERVICE CONTRACT ACT (41 U.S.C. §§ 351-358) SO AS TO SUPPORT DEBARMENT OF PETITIONERS FROM PERFORMING CONTRACTS FOR THE UNITED STATES WHEN RESPONDENT HAS FAILED TO PROVIDE INSTRUCTION AS REQUIRED BY THE REGULATION.
3. WHETHER RESPONDENT'S DECISION THAT PETITIONERS DELIBERATELY VIOLATED THE SERVICE CONTRACT ACT, AND RESPONDENT'S RELIANCE ON ALLEGED FACTS NOT IN EVIDENCE OR PART OF THE ADMINISTRATIVE RECORD, TO SUPPORT AN ORDER BARRING PETITIONERS FROM PERFORMING CONTRACTS FOR THE UNITED STATES VIOLATED THE ADMINISTRATIVE PROCEDURES ACT.

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II.

REPORTS AND OPINIONS OF THE COURTS AND ADMINISTRATIVE AGENCY BELOW.

1. Appeal is taken from the decision of the United States Circuit Court, Sixth Circuit: JOSEPH C. KIRCHDORFER AND SKIP KIRCHDORFER, INC., V. SECRETARY, U.S. DEPARTMENT OF LABOR, Case Number 89-5778, Opinion Filed February 16, 1990.
2. The Opinion appealed to the Circuit Court was the Opinion issued by the United States District Court for the Western District of Kentucky at Louisville, JOSEPH C. KIRCHDORFER AND SKIP KIRCHDORFER, INC., v. ANN MCLAUGHLIN, SECRETARY, U.S. DEPARTMENT OF LABOR, Civil Action Number 88-0771-1(b), filed May 26, 1989.
3. The Administrative Decision appealed to the United States District Court was the final decision of the Secretary of Labor, IN THE MATTER OF JOSEPH C. KIRCHDORFER d/b/a SKIP KIRCHDORFER, INC., Case Number 83-SCA-111, Issued September 28, 1988.

III.

GROUND ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

Petitioners appeal from the decision of the United States Circuit Court for the Sixth Circuit entered on February 16, 1990, affirming without discussion the decision rendered by the United States District Court for the Western District of Kentucky, as identified above, entered May 26, 1989.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS.

1. Fifth Amendment of the United States Constitution.
2. 5 U.S.C. § 706
3. 41 U.S.C. § 352(a), (b).
4. 41 U.S.C. § 354(a).
5. 29 C.F.R. § 4.6(b)(2) (1982).
6. 29 C.F.R. § 4.171(b) (1982).
7. 29 C.F.R. § 4.173(b) (1988).
8. 29 C.F.R. § 4.187 (1988).
9. 29 C.F.R. § 4.188(b)(1) (1988).

Provisions of the above-referenced citations are set forth in full in Appendix hereto.

V.

STATEMENT OF THE CASE

Petitioner Skip Kirchdorfer, Inc. ("Kirchdorfer") was awarded contracts to provide maintenance service at two installations of the United States Department of the Army, the period of which spanned portions of 1982 through 1985. In manning the contracts, Kirchdorfer complied with all provisions of 29 C.F.R. § 4.171(b)(1982) to establish pay scales for employees in positions not listed on the schedule of prevailing wages published by Respondent. Kirchdorfer continued to apply the provisions of 29 C.F.R. § 4.171(b)(1982) throughout the period of the contracts in the same manner as initially applied and approved by Respondent. Respondent deemed Kirchdorfer's subsequent application of

29 C.F.R. § 4.171(b)(1982) to constitute intentional violation of the Service Contract Act.

During the course of performance of the above-referenced contracts, Kirchdorfer paid employees vacation benefits in accordance with the provisions of 29 C.F.R. § 4.172(b)(2) by establishing a method of distinguishing between continuous employees and new employees as required by 29 C.F.R. § 1.173 (1982). Despite the absence of any regulatory guidelines for establishing a distinction between continuous and new employees, Respondent deemed Kirchdorfer's method a deliberate violation of the Service Contract Act.

Kirchdorfer maintained a method for accurately recording hours of overtime work by its employees which included a self-reporting system. During performance

of the contracts, Kirchdorfer provided to the contracting authorities detailed records as to the time worked by each of its service employees. Respondent refused to consider the detailed records but contrary to the rule stated in Anderson v. Mount Clements Pottery Company, 328 U.S. 680 (1946), relied on employees incomplete self-reporting records of hours worked and concluded that Kirchdorfer deliberately and intentionally failed to pay employees overtime benefits.

Respondent concluded that Kirchdorfer had failed to pay a total of approximately Fifteen Thousand Dollars (\$15,000.00) to an aggregate of fourteen (14) employees employed under contracts totalling in excess of Four Million Dollars (\$4,000,000.00), and that Kirchdorfer was liable for said \$15,000 to its employees. In addition, Respondent's conclusion that

all of the above-said alleged violations were deliberate compelled Respondent to conclude that extenuating circumstances did not exist such as to relieve Kirchdorfer from the debarment provisions of the Service Contract Act (41 U.S.C. § 354(a)).

In rendering the initial decision to debar Petitioners pursuant to the provisions of 41 U.S.C. § 354(a), the Courts below and the Administrative Tribunal erroneously attributed prior federal labor law violations to Petitioners despite the total absence of any evidence in the record of such prior violations. In addition, Petitioners were held responsible for failure to pay proper wages and benefits to one employee based solely on allegations contained in the initial Complaint and without any evidence of record that the employee was not fully

paid in accordance with Federal wage and hour law requirements.

In determining that Petitioners intentionally violated Federal wage and hour laws in this instance, the courts below failed to apply the teachings enunciated in McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677, ___ U.S. ___, (1988). In addition, the proceedings below improperly applied provisions of Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946) by shifting the burden of proof to Petitioners without having determined that wage and hour violations existed based on the most accurate basis possible under the circumstances.

The basis for federal jurisdiction in the court of first instance, Administrative Proceedings before an administrative law judge, raised issues related to the Federal Service Contract

Act, the Federal Contract Wage, Hours and Safety Standards Act, and regulations promulgated thereunder and were probably subject to Administrative Procedures Act, and thereby provide the basis for federal jurisdiction.

VI.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Court of Appeals for the Sixth Circuit decided an important question of federal law which is in conflict with decisions of the United States Supreme Court, as enunciated in McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677, ____ U.S. ____ (1988).

In its good faith effort to comply with the requirements of 29 C.F.R. § 4.171(b)(2) (1982) establishing wage rates for employees in job classifications not identified on Respondent's prevailing wage lists, Kirchdorfer strictly applied

the clearly stated requirements of the directives of that regulation. Regulation provided that where there is disagreement, Respondent's own-site representative must seek clarification from Respondent's appropriate office. Respondent breached the regulatory requirement and held Kirchdorfer liable for the breach, deeming it to be intentional, which position has been sustained by the courts of appeals below. The conclusions of the Courts below is in direct conflict with the Supreme Court's holdings in Richland Shoe, supra.

B. The findings and conclusions of Respondent, sustained by the courts of appeals below, were based, in part, on the shifting of the burden of proof of non-violation of the Service Contract Act to Kirchdorfer, contrary to the directive stated by the United States Supreme Court

in Anderson v. Mount Clemens Pottery Co.,
328 U.S. 680 (1946).

In Mount Clemens Pottery, the Supreme Court ruled that Respondent has the burden of proof that an employer violated Federal wage and hour laws up to the point that Respondent proffers evidence in the form of the most accurate basis possible under the circumstances, at which point the burden to prove shifts to the employer to demonstrate no violation of the law. The record of proceedings before Respondent establishes that the most accurate basis possible for determining the amount of time worked by individual employees was information contained on service call cards which, at all times, were in the possession of the Government. Respondent never proffered this evidence, and the Administrative Law Judge improperly shifted the burden of proof of non-

violation to Kirchdorfer. The Courts of Appeals below have sustained the Administrative Law Judge's abuse of discretion. The decision of the Courts of Appeals below is in direct conflict with standing decisions of the Supreme Court.

C. Decisions in the proceedings below relied on alleged facts outside of the administrative record in violation of applicable provisions of the Administrative Procedures Act, and constitutes a taking without due process of law in violation of the Fifth Amendment of the Constitution.

The Administrative Law Judge, sustained by the courts of appeals below, found that Kirchdorfer failed to pay certain employees wages and fringe benefits. Respondent failed to present any evidence that certain employees were not properly

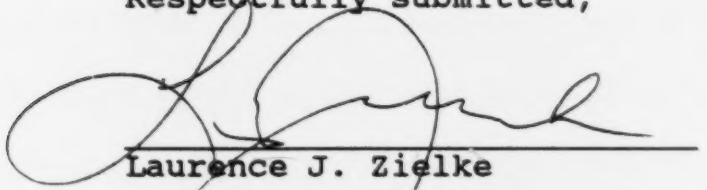
paid in accordance with Federal wage and hour laws.

D. Respondent, in reviewing the Administrative Law Judge's findings and conclusions, despite arguments presented by Kirchdorfer, failed to acknowledge a total absence of evidence on which certain assessments against Kirchdorfer were recommended by the Administrative Law Judge. It is evident that Respondent failed to employ the requisite standard of review in adopting the ALJ's findings and conclusions. Greater Boston Television Corp. v. Federal Communications Comm., 467 F.2d 841 (D.C. Cir.) cert. denied, 91 S.Ct. 229, 403 U.S. 923, cert. denied, 92 S.Ct. 30, 404 U.S. 877, cert. denied, 92 S.Ct. 2042, 406 U.S. 943 (1970). As a result, Kirchdorfer has been ordered to relinquish substantial amount of money, which order constitutes a taking without

due process of law in violation of the Fifth Amendment to the Constitution.

E. The decision to debar Kirchdorfer from accepting further Government contracts was based, in part, on improper application of the rule enunciated in McLaughlin v. Richland Shoe Co., supra, and on consideration of alleged facts not in evidence, constituting an abuse of discretion, was arbitrary and capricious, not in accordance with law and constitutes an excess of statutory right and authority in violation of the Administrative Procedures Act. First Girl, Inc. v. Regional Manpower, Administrator of U.S. Department of Labor, 499 F.2d 122 (9th Cir., 1974).

Respectfully submitted,



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